

Supreme Court, U. S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-415

JAMES E. SALYERS,

Petitioner

v.

**BOARD OF GOVERNORS OF STATE
COLLEGES AND UNIVERSITIES OF ILLINOIS,
GILBERT C. FITE, WOLFGANG SCHLAUCH
and MARION L. ZANE,**

Respondents.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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INDEX

Table of Cases	i
Statutes Cited	ii
Questions Presented	4
Statement of Case	5
Argument (Reasons for Denying Writ)	9
Conclusion	14

Table of Cases

Allen v. Meyer, 14 Ill. 2d 284 (1958)	13, 14
Barr v. City of Columbia, 378 U.S. 546; 84 S. Ct. 1734 (1964)	11
Davis v. Davis, 128 Ill. App. 2d 427 (1970)	10
Davis v. Wechsler, 263 U.S. 22; 44 S. Ct. 13 (1923)...	11
First National Bank v. Blair, 266 Ill. App. 222 (1932)	10
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968)	13
Harris v. Annunzio, 411 Ill. 124 (1952)	10
Henry v. State of Mississippi, 379 U.S. 443, 446 (1965)	12
Herb v. Pitcairn, 324 U.S. 117, 125; 65 S. Ct. 459, 4-2 (1955)	11, 12
Husted v. Thompson-Hayward, 62 Ill. App. 2d 287 (1965)	10
Johnston Ford Company v. Lewan, 71 Ill. App. 2d 420 (1966)	11
Libman v. Gipson, 93 Ill. App. 2d 65 (1968)	11
Lundahl v. Hansen, 147 Ill. 504 (1893)	14
Moore v. Knutsen Trucking Company, Inc., 28 Ill. App. 3d 679 (1975)	10
People v. Thornhill, 31 Ill. App. 3d 779, 789 (1975) ..	10

Smith v. Chicago State University, 23 Ill. App. 3d 942 (1974)	11
Smith v. Township High School Dist. 158, 335 Ill. 346 (1929)	14
Wenige-Epperson Inc. v. Jet Lite Products, Inc., 28 Ill. App. 3d 320 (1975)	11
Whitley v. Frazier, 21 Ill. 2d 292 (1961)	14

Statutes Cited

Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A.	13
Illinois Revised Statutes, 1975 Ch. 110, Sec. 2	1
Illinois Revised Statutes, 1975 Ch. 110, Sec. 3	2
Illinois Revised Statutes, 1969 Ch. 110, Sec. 57	13
Illinois Revised Statutes, Ch. 110A; Illinois S. Ct. Rule 342	2, 6
Illinois Revised Statutes, Ch. 110A; Illinois S. Ct. Rule 343	3, 6

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Respondent respectfully prays that the Petition for a Writ of Certiorari, filed in this cause, be denied.

STATUTORY PROVISIONS AND RULES INVOLVED

It is essential to supplement the provisions cited by Petitioner by making reference to several Illinois Statutes and Illinois Supreme Court Rules.

Illinois Revised Statutes 1975 Chapter 110 section 2 provides:

"The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making

this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in respect of small claims, including service of process in connection therewith"

Illinois Revised Statutes 1975 Chapter 110 section 3 provides:

"The Supreme Court may provide by rule for the orderly and expeditious administration and enforcement of this Act and of the rules adopted hereunder, including the striking of pleadings, the dismissal of claims, the entry of defaults, the assessment of costs, the assessment against an offending party of the reasonable expenses, including attorney's fees which any violation causes another party to incur or other actions that may be appropriate."

Illinois Revised Statutes 1975 Chapter 110A, Illinois Supreme Court Rule 342 provides:

- (b) Time for filing. No later than 14 days after the due date of the appellee's brief, the appellant shall file the excerpts from record. Extensions or reductions of time may be obtained in the manner prescribed for briefs. See Rule 343(b).
- (e) Abstract. The Appellant may elect to file an abstract of the record on appeal in lieu of the excerpts from record, in which event the abstract shall be filed with his brief. . . .
- (i) Excusing Excerpts or Abstract. Upon good cause shown after the filing of the record on appeal, the reviewing court or a judge thereof may excuse the filing of excerpts from record or an abstract or the abstracting of matters in the record even though they are to be considered on appeal.

Illinois Revised Statutes 1975 Chapter 110A Illinois Supreme Court Rule 343 provides:

- A. Time — "Except as otherwise provided in these Rules . . . , the brief of the appellant shall be filed in the reviewing court within 35 days from the filing of the record on appeal"
- B. Extending or shortening time. The reviewing court or a judge thereof sua sponte or upon the motion of a party supported by an affidavit showing good cause, may extend or shorten the time of any party to file a brief.

QUESTIONS PRESENTED

The questions presented by Petitioner to this Court (Pet. 2, 3) do not accurately reflect the issue which was presented to the Illinois Appellate and Illinois Supreme Court. The due process question was presented to the trial court in and through a motion by the Respondent for summary judgment, which motion was granted. This case and the questions raised therein were resolved upon independent and adequate State procedural grounds.

The only issue presented by the Writ of Certiorari in the instant case is whether the Illinois Appellate Court was warranted in dismissing the Appeal of Petitioner for failure to comply with State procedural requirements and whether the Illinois Supreme Court was warranted in refusing the Petition for leave to appeal.

STATEMENT OF CASE

Petitioner's statement of the case does not recite the question actually considered by the Fourth District Appellate Court of Illinois, and the Supreme Court of Illinois. For this reason, Respondent believes it is essential to restate the case as accurately and briefly as possible.

James Salyers was a non-tenured faculty member at Eastern Illinois University. Eastern Illinois University is governed by the Respondent Board, which is a body corporate and politic. The instant case does not involve non-renewal of a non-tenured faculty member. The instant case involves suspension for cause with pay of a faculty member for the duration of an academic year. A post-suspension hearing process was available to the Petitioner, and although he was aware of it, he did not pursue it. (Petitioner's Appendix A 1-9).

A motion for summary judgment was filed in the Circuit Court (trial court) by the Respondent together with a memorandum of authorities. Petitioner, through his counsel, responded in opposition to Respondent's motion for summary judgment and submitted a memorandum of authorities. Oral argument was had by the respective parties through their counsel on April 29, 1976, after which the Court took this matter under advisement. On May 13, 1976, Respondent's motion for summary judgment was granted and judgment was entered thereon (Pet. Appendix A 1-A-9). Notice of appeal to the Illinois Supreme Court was filed by the Petition on June 9, 1976. This appeal was to the wrong Court, but pursuant to Illinois Supreme Court Rules, such an error is not a waiver of the right to present any issue to the appropriate Court and the instant case

was transferred by the Supreme Court to the Illinois Appellate Court, Fourth District.

The record on appeal was filed in the Fourth District Appellate Court on August 10, 1976. Pursuant to Supreme Court Rules 342 and 343, the brief and abstract of record of the Petitioner was to be filed in the reviewing court within 35 days from the filing of the record on appeal. Extensions of time are granted pursuant to Illinois Supreme Rules upon good cause shown. The filing of excerpts from the record or of an abstract was not excused by the Court in the instant case, although it may have been pursuant to the provisions of *Illinois Revised Statutes* Chapter 110A section 342.

On September 22, 1976, the Fourth District Appellate Court of Illinois entered the following order:

"Appellant ruled to show cause, on or before October 6, 1976, why appeal should not be dismissed for failure to comply with Rules 342 and 343. Failure to comply with the Rules will result in dismissal of appeal."

On October 4, 1976, attorney for Petitioner filed an affidavit, purporting to explain the reason or to show just cause why the matter should not be dismissed by the Fourth District Appellate Court. Counsel for Petitioner claimed to have filed a motion for extension of time within which to file Petitioner's brief together with a motion to transfer the case to the Illinois Supreme Court on the 17th day of August, 1976. Neither the Court nor the Respondent received a copy of these motions.

On October 8, 1976, the Respondent filed objections and motion to dismiss the appeal. The objections and motion to dismiss the appeal of the Respondent stated that Petitioner failed to show just cause why the appeal should not be dismissed and that no explanation or reason was pro-

vided to the Court for the failure to comply with the respective time limitations.

On October 20, 1976, the Fourth District Appellate Court of Illinois entered the following order:

"Rule on Frederick C. Kubicek, Attorney for Appellant to file a written response to Appellee's motion to dismiss appeal, said written response to be filed in this Court on or before November 1, 1976."

On October 27, 1976, Petitioner filed their response to Respondent's objections and motion to dismiss the appeal. At that time, Petitioner also filed a motion to excuse filing the abstract from record and a motion to extend the time within which to file their brief and argument.

On December 20, 1976, the Fourth District Appellate Court of Illinois dismissed Petitioner's appeal (B-1 and B-2).

On December 21, 1976, the mandate of the Appellate Court was filed in the Circuit Court of Coles County, Illinois.

On January 12, 1977, a Petition for Leave to Appeal to the Illinois Supreme Court was filed with the Clerk of the Supreme Court by the attorney for the Petitioner.

On January 20, 1977, Respondents filed their answer to the Petition for Appeal.

On January 27, 1977, a motion was filed in the Appellate Court by attorney for Petitioner to recall the mandate.

On February 10, 1977, that motion was denied by the Fourth District Illinois Appellate Court.

On February 11, 1977, attorney for the Petitioner filed a motion in the Illinois Supreme Court to recall the mandate of the Appellate Court, which was filed in the Circuit Court on December 21, 1976.

On February 28, 1977, the Illinois Supreme Court ordered recall of the mandate.

On March 31, 1977, the Illinois Supreme Court denied that Petition for Leave to Appeal.

On April 13, 1977, Petition for rehearing was filed in the Supreme Court of Illinois by the Petitioner. The Illinois Civil Practice Act and Illinois Supreme Court Rules do not provide for a rehearing on an order denying a Petition for Leave to Appeal. Accordingly, the Illinois Supreme Court treated this matter as a Petition for Reconsideration.

On May 18, 1977, the Illinois Supreme Court denied the motion of the Petitioner for reconsideration of the order denying the Petition for leave to appeal. The mandate of the Court was filed in the Circuit Court of Coles County on the 20th day of May, 1977.

Although the Petition for Writ of Certiorari is presented by the Petitioner pro se, Petitioner was represented by counsel in the Circuit, Appellate and Supreme Courts of Illinois as well as upon the filing of the Petition for an extension of time within which to file his Petition for the Writ of Certiorari.

ARGUMENT

(REASONS FOR DENYING THE WRIT)

Petitioner's prayer for issuance of a Writ of Certiorari should be denied. This Court does not have jurisdiction of the instant case. The constitutional questions which Petitioner has raised are not before this Court and were not squarely before the Illinois Appellate and Supreme Courts. The Court is not presented with any questions involving any substantive law. It is respectfully submitted that the Illinois procedural requirements for appeal in Illinois were the only matters considered by the Illinois Appellate and Illinois Supreme Courts. These requirements are set forth in the Illinois Supreme Court Rules which are promulgated pursuant to authority granted by statute to the Court by the Illinois General Assembly. Those Rules serve a legitimate state interest. The discretion exercised by the Illinois Appellate Court in dismissing the appeal of Petitioner and by the Illinois Supreme Court in denying Petitioner's request for leave to appeal was not abused. The Appeal of the Petitioner from the decision in Circuit Court of Illinois was dismissed due to the failure of the Petitioner through his counsel to comply with the procedural requirements of the Illinois Supreme Court Rules. The Illinois Courts did not exceed their jurisdiction and they have proceeded according to the essential requirements of Illinois procedural law. A Writ of Certiorari will not lie for review of an exercise of discretion.

Petitioner had his day in Court. At the trial level, depositions were taken and pretrial discovery was complete. There wasn't a genuine issue as to any material fact, and accordingly, the Respondent filed a Motion for Summary Judgment to that effect. The issues were briefed and

argued by all parties. Memoranda of Authority were provided to the Court and oral argument was made in support and in opposition. The Court took this matter under advisement on April 29, 1976 and rendered the decision granting Respondent's motion for summary judgment on May 13, 1976. The Court rendered their decision on independent state grounds and those grounds are supported by a legitimate state interest.

The Fourth District Appellate Court of Illinois entered a rule against the Petitioner to show cause why their appeal should not be dismissed. Ample opportunity was given to counsel for Appellant to state his position and to cite authorities and argument in support thereof. After taking this matter under advisement, the Fourth District Appellate Court dismissed the Appeal.

Time limitations on appeal are to be strictly adhered to by the litigants. Their failure to do so may result in the dismissal of that appeal. The Illinois Appellate Courts have regularly dismissed litigation where the abstract of record or excerpts from the record have not been filed by the Appellant. *First National Bank v. Blair*, 266 Ill. App. 222 (1932). Dismissals have been dealt with summarily. *Moore v. Knutsen Trucking Company, Inc.*, 28 Ill. App. 3d 679 (1975); *Davis v. Davis*, 128 Ill. App. 2d 427 (1970); *Harris v. Annunzio*, 411 Ill. 124 (1952). Dismissal often occurs when the abstract or excerpts are filed but not complete. *Husted v. Thompson-Hayward*, 62 Ill. App. 2d 287 (1965).

The Illinois Appellate Court, First District, in *People v. Thornhill*, 31 Ill. App. 3d 779, 789 (1975) stated:

"... we are ... serving notice, that in the future, the press of other business may not be sufficient grounds to justify any delays. We repeat the warning of this Court in *Gray v. Gray*, 6 Ill. App. 2d 571, 578 (1955),

that it is counsel's duty to procure the aid and assistance necessary to alleviate such conditions or to see to it that such business will be handled by less clogged offices. Prompt disposition of litigation is too important to be delayed because a select group of attorneys may be enjoying more business at a given moment than their brethren."

Illinois Courts strongly disapprove of any non-compliance with the rules of procedure which are adopted to expedite the Appellate process, and they will not hesitate to dismiss an appeal where appropriate. *Wenige-Epperson Inc. v. Jet Lite Products, Inc.*, 28 Ill. App. 3d 320 (1975). Failure to file a brief within the necessary time period resulted in a dismissal pro forma in *Smith v. Chicago State University*, 23 Ill. App. 3d 942 (1974). Where a party fails to present a proper record, the Court of Review may, on its own motion, dismiss the appeal. *Libman v. Gipson*, 93 Ill. App. 2d 65 (1968). In fact, the appeal may be dismissed for the Appellant having filed as part of the record on appeal a document that neither qualifies as a report of proceedings or an agreed statement of facts. *Johnston Ford Company v. Lewan*, 71 Ill. App. 2d 420 (1966).

Constitutional questions are not in issue in the instant case. The sole question is whether the state procedural requirements were followed. If they were not, this Honorable Court is deprived of the right to review. *Barr v. City of Columbia*, 378 U.S. 546; 84 Sup. Ct. 1734 (1964). This Court is not to review state court judgments which rest on independent and adequate state grounds in cases involving state's procedural rule matters. *Herb v. Pitcairn*, 324 U.S. 117, 125; 65 Sup. Ct. 459, 4-2 (1955); *Davis v. Wechsler*, 263 U.S. 22; 44 Sup. Ct. 13 (1923). The instant case rests on independent and adequate state grounds and involves state procedural matters. The Illinois rules serves the legitimate state interest and the failure to comply by

Plaintiff's counsel will serve as a bar to federal review of the questions submitted by Petitioner.

The Respondent maintains that the questions presented to this Court are not those stated by the Petitioner. Regardless, the Circuit Court resolved those issues on independent and adequate state procedural grounds.

In *Henry v. State of Mississippi*, 379 U.S. 443, 446 (1965), Mr. Justice Brennan wrote:

"It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal question. The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. ed. 429, but also in cases involving state procedural grounds."

The reason for the United States Supreme Court's refusal to review petitions where adequate state grounds exist was stated by Mr. Justice Jackson in *Herb v. Pitcairn*, U.S. 118, 125-126 (1945):

"The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction We are not permitted to render an advisory opinion and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

The test to be applied where a litigant's procedural default might prevent vindication of his alleged federal right is whether "the state's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. State of Mississippi*, 379 U.S. 443, 446 (1965).

The Illinois statute on summary judgments and the procedural rules providing for its implementation, as applied in this case, serve legitimate and important state interests. The Illinois Supreme Court delineated those interests when they stated:

"We have previously held that summary judgment procedure is an important tool in the admission of justice, that its use in a proper case is to be encouraged and that its benefits inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials. *Allen v. Meyer*, 14 Ill. 2d 284."

The Illinois Statute on summary judgments (*Illinois Revised Statutes* 1969, Chapter 110, section 57), heretofore set forth verbatim, is substantially the same as Federal Rule of Civil Procedure 56 (Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.). It provides that upon motion for summary judgment the judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Under Federal Rules of Civil Procedure, just as under the Illinois Civil Practice Act, it is clear that, faced with these circumstances and matters, a Federal Court has granted the Respondent's Motion for Summary Judgment. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968), the Court noted that it "is required . . . that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Petitioner in this case failed to present sufficient evidence.

CONCLUSION

The issues as stated by Petitioner and the questions framed in their Petition for Writ of Certiorari are not before this Honorable Court. The Illinois Appellate and Illinois Supreme Court rendered their decisions upon the failure of the Petitioner to comply with the Rules of the Illinois Supreme Court regarding appeal. Their decisions were on procedural matters and involve their exercise of discretion. The subject this Court does not have jurisdiction in the instant case and is barred from consideration of the questions submitted by the Petitioner.

Even if the questions presented by the Petitioner were properly before this Court, the Petition for Writ of Certiorari should be denied.

The Illinois Circuit Court has decided this case in accordance with well established procedural law, patterned substantially after Federal Rules of Civil Procedure. Illinois law has been applied consistently in the manner that it was applied in this case. *Whitley v. Frazier*, 21 Ill. 2d 292 (1961); *Smith v. Township High School Dist. 158*, 335 Ill. 346 (1929); *Lundahl v. Hansen*, 147 Ill. 504 (1893). It is clear that adequate, independent state grounds exist for the decision in this case and that these grounds are supported by a legitimate state interest. *Allen v. Meyer*, 14 Ill. 2d 284 (1959).

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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